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A SIMPLE PURCHASE AND SALE THROUGH A STOCKBROKER.

DURING the last hundred years there has been an enormous increase in the indebtedness of corporations and political bodies. This has been accompanied by a corresponding increase in the amount of what are known as the securities of corporate and political bodies, which are used as evidence of the larger part of this indebtedness. Since these securities have a value which is measured in money, they are constantly used to raise money on, constantly bought to invest money in and sold to realize money from. So, too, there is a great deal of speculative buying and selling in those kinds of securities whose values fluctuate either from natural or artificial causes. All these transactions in securities centre wherever money centres. In such places are found stockbrokers, so called, who make it their business to act as agents for the many individuals who wish to deal in or with securities. Wherever there are many stockbrokers, as in the larger money centres, it has been found convenient to establish Stock Exchanges. These are in their nature private business associations or clubs,[1] founded by stockbrokers to facilitate[2] and regulate dealings in

[1] Commercial Tel. Co. *v.* Smith, 47 Hun (N. Y.), 494; Belton *v.* Hatch, 109 N. Y. 596; Clute *v.* Loveland, 68 Cal. 254. Stock Exchanges are not usually incorporated, nor are they to be deemed partnerships; on their nature see cases cited; also Dos Passos on Stock-brokers and Stock Exchanges, 12–17; 23 Am. & Eng. Enc. of Law, 748, under title "Stock Exchange."

[2] Dos Passos. Preface, page v.

securities, to which other stockbrokers may become members by election.[1] Governors, officers, and committees with power to make rules regulating matters connected with the Exchange, the conduct of its members, and the transaction of business are elected by the members. The rules they make are supplemented by a variety of established customs, which have the same force and effect as the written rules.

A stockbroker who is a member of a Stock Exchange must act in accordance with its rules and customs if his dealings are to be allowed and receive its recognition. It follows that a person who wishes to employ a stockbroker in his capacity of member of a Stock Exchange must do so in such a way that the stockbroker's acts under employment can conform to the rules and customs of his Exchange. For this reason it seems best to state what are the main[2] rules and customs of American[3] Stock Exchanges relating to the conduct of business by their members before considering the relations of stockbrokers with their employers, who are commonly called "customers" or "clients."

1. Every Stock Exchange provides a meeting place, called "the floor" of the Exchange, where its members may transact business with one another.

2. Every Stock Exchange allows dealings on its floor only in certain kinds of securities which are selected by the governors or by a committee. Since these securities are placed, when selected, on some kind of a published list, they are known as "listed securities."[4]

3. Every Stock Exchange allows only certain kinds of transactions in listed securities to be made on its floor, and the way these transactions must be performed is fixed in detail by the rules and customs of each Exchange. The most important of these transac-

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[1] This article only deals with stockbrokers who are members of a Stock Exchange.

[2] These are the same on all American Stock Exchanges. The matters in which rules and customs do differ are not of a character to need particular consideration in this article.

[3] This article is not concerned with the rules and customs of European Stock Exchanges which are different from those of American Stock Exchanges; see Mr. George R. Gibson's book on "The Stock Exchanges of London, Paris, and New York," and his pamphlet on "The Berlin Bourse"; also Dos Passos, chaps. iv., v., vi.

[4] It is usual for a Stock Exchange to have a "department" of so-called "unlisted securities," in which dealings are allowed on its floor. Though the greater part of this article applies as well to "unlisted" securities as well as to "listed," it is written only with reference to the latter, and the word securities will be used only in the sense of securities which are listed on some Stock Exchange.

tions is the purchase and sale of listed securities, and the manner in which this must be performed is practically the same on all American Stock Exchanges, and is in general as follows.

By the rules of every Stock Exchange its members are only permitted to deal with one another "on the Exchange" between certain hours of every business day. Between these hours the members congregate "on the floor" of the Exchange and are permitted then and there to offer and to accept offers to buy or to sell securities for cash. These offers and acceptances are made by word of mouth or merely by customary signs. In making or accepting one of these offers a stockbroker always acts as if he were acting for himself only,[1] even though he may actually be acting as an agent, and thus the contract which results when an offer is accepted is on its face a contract only between the two stockbrokers.

The nature of these contracts must depend on the nature of the offers in which they originate. All these offers are of the same general description, being offers either to buy ("bids for") or offers to sell a specific amount of securities for a money price, which is understood to be payable in all cases *on the delivery of the securities.* Every offer expressly or impliedly states when such delivery shall or may be "made" by the selling stockbroker or may be "called" (demanded) by the buying stockbroker.

There is a variety of "deliveries," so called, permitted by the rules of every Stock Exchange, for any one of which either an offer to buy or an offer to sell securities may be made. The usual[2] "deliveries" are as follows.

(1) Offers to buy or to sell "for cash."

If an offer to buy or to sell "for cash" is accepted the rules of all Stock Exchanges fix a particular time in the same business day in which the contract is made before which delivery of the securities must be made by the seller.

(2) Offers to buy or to sell in the "regular way" or "regular."

If an offer to buy or to sell "regular" is accepted, the rules of all Stock Exchanges fix a particular time in some particular busi-

[1] If the stockbroker is acting for a fellow member of his Stock Exchange, he may, if such fellow member is willing, "give up" such fellow member in his place as a principal if the stockbroker with whom he is contracting does not object. If the stockbroker is acting for an outsider, he cannot give him up as a principal and at all times carefully conceals his identity. The custom of dealing in this way has been held to be "reasonable." Whitehouse *v.* Moore, 13 Abb. Pr. (N .Y.) 42 ; Peckham *v.* Ketcham, 10 Abb. Pr. (N. Y.) 220; s. c. 5 Bos. (N. Y.) 506; Horton *v.* Morgan, 19 N. Y. 170.

[2] All Stock Exchanges do not allow *all* of the deliveries stated in the text, though the New York Stock Exchange does.

ness day *following* the day on which the contract is made before which delivery of the securities must be made by the seller.[1]

(3) Offers to buy or to sell where the time of delivery is postponed until a fixed time not further off than three days.

Offers of this sort are offers to buy or to sell "at three (or two) days." If an offer of this sort is accepted, delivery of the securities must be made by the seller on the third or second day after the contract is made, as the case may be, and before a certain time on such day.

(4) Offers to buy or to sell where the time of delivery may be postponed until a fixed time not further off than three days.

Offers of this sort are offers to buy or to sell "buyer three" (days) or "seller three" (days). An offer to buy or to sell "seller three," if accepted, gives the seller the option of making delivery of the securities at any time before a fixed time on the third day after the contract is made; and an offer to buy or to sell "buyer three," if accepted, gives an option to the buyer of calling (demanding) delivery of the securities at any time before a fixed time on the third day after the contract is made.

(5) Offers to buy or to sell where the time of delivery may be postponed for longer than three days but not longer than sixty[2] days.

The commonest form of such offers are offers to buy or to sell securities "buyer thirty" (days) or "seller thirty" (days), or "buyer sixty" (days) or "seller sixty" (days). Such offers, if accepted, give options similar in all respects except that of length of time to those in the case of "buyer three" or "seller three." After offers of this kind are verbally made and accepted they are reduced to writing;[3] such written contracts are known as "Stock Exchange contracts."[4]

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[1] On most Stock Exchanges it is the next business day after the day in which the contract is made.

[2] "Sixty days" is the longest period usually allowed by the rules of Stock Exchanges to which delivery may be postponed.

[3] Since these contracts are in writing, the Statute of Frauds has no application to them; with the others which remain verbal, they are taken out of the Statute by the exchange of comparison tickets between the stockbrokers, which takes place as soon as possible after the contract is made. This seems to have been overlooked in those cases in which it is stated that these verbal contracts are within the prohibition of the Statute. See Brownson *v.* Chapman, 63 N. Y. 625; *semble* Roger *v.* Gould, 6 Hun (N. Y.), 229, and Dos Passos, 107, 674, 676. This question is of slight practical importance, as every Stock Exchange enforces its remedies for breach of contract (see *post*, page 440) irrespectively of the requirements of the Statute of Frauds.

[4] These contracts are also known as contracts for "future" delivery, in contradis-

(6) Offers to buy or to sell where the time of delivery is fixed by the happening of some future event.

Common forms of such offers are offers to buy or to sell securities "seller opening of books," "to arrive" or "when issued." If an offer of this kind is accepted, delivery of the securities must be made by the seller as soon as the event stated in the offer happens.

The nature of all the different kinds of offers permitted to be made on the floor of Stock Exchanges being described, the nature of all contracts made by the acceptance of any of such offers can now be determined. All these contracts are alike in being contracts to buy or to sell a specified amount of securities for a money price to be paid on the delivery of the securities. They differ only with respect to the time when delivery of the securities must or may be made by the seller or may be called by the buyer, and in all cases this is postponed until some time after the contract is made. In all of these contracts it is clear that the intention of the parties is to postpone the passing of the title of the securities contracted to be bought or sold until they are delivered and the purchase price paid. In no case is an immediate transfer of title contemplated. All of them look to the occurrence of this result when, and not until, they are performed, and the only difference between them is as regards the time when they are to be performed. Hence, as no actual sale of personal property can occur without a complete transfer of title from the seller to the buyer, these contracts do not constitute actual purchases and sales, but are *contracts to make purchases and sales* at the time when they are to be performed by the delivery of the securities and the payment of the purchase price. All of them are what are called "executory contracts of sale," in which the actual purchase and sale does not take place until the contract is performed. It is, however, usual for stockbrokers to call contracts to buy or to sell securities "for cash," or "regular," "purchases" or "sales," and only to call contracts where the delivery may be postponed for longer than three days, "Stock Exchange contracts" or "*contracts* for the receipt or delivery of securities." Contracts to buy or to sell securities where the time of delivery may be or is postponed until a fixed time not further off than three days stand by themselves. They are never

tinction to all other deliveries (except that numbered (6) above) which are known as "immediate," though of course this term has only a relative significance. Contracts for future delivery carry interest, and in their case a "margin" may be demanded by the rules of all Stock Exchanges by either stockbroker from the other.

called "contracts," but are usually included under the head of "purchases" or "sales."[1]

All these contracts have some time to be performed, and inasmuch as in contracting each of the stockbrokers acts as a principal each is legally bound[2] to the other to perform his part under the terms of any of these contracts. If he fails to do so, every Stock Exchange gives to the other stockbroker an effective and immediate method of liquidating his loss,[3] and will enforce this liquidated claim so far as it is able by suspension of the defaulting stockbroker, and the sale of his "seat" or share in the Exchange.[4] To facilitate stockbrokers in performing the contracts that they make, every Stock Exchange has established rules by which the performance[5] of all contracts made on its floor can be conveniently and expeditiously carried out. In consequence of this, every offer to buy or to sell securities, made on the floor of a Stock Exchange, is understood to contain an implied term to the effect that the contract which will result from its being accepted shall be performed according to the rules of such Stock Exchange. It is to be noted that by these rules the actual performance of any of these contracts takes place away from the Stock Exchange on the floor of which it is made. In spite of this, it is customary to speak of "buying" and "selling"[6] securities "on the floor" or "on the Exchange," and also of purchases and sales being made "on the floor" or "on the Exchange," where it would be more proper to speak of *contracting* to buy or to sell, and of *contracts* for the purchase and sale of securities.

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1 The verb generally used in all cases "to buy" or "to sell," instead of "to contract to buy" or "to contract to sell."

2 Where a stockbroker contracts in his own name, even though he be actually acting for an undiscovered principal, he can sue and be sued on his contract as a principal. Knapp *v.* Simon, 96 N. Y. 284, s. c., 86 N. Y. 311; Cobb *v.* Knapp, 71 N. Y. 384; Mechem on Agency, §§ 929, 957, 977, 983.

3 By a so-called purchase or sale "under the rule," see Constitution and Rules of the New York Stock Exchange, Art. XXIX. In consequence of this remedy it is not usual for a member of a Stock Exchange to sue another for a breach of a contract made on its floor, and suits by a customer (the undiscovered principal) against a stockbroker who has defaulted on a contract made with the customer's stockbroker are unheard of.

4 On the nature of a stockbroker's seat on an Exchange, see Dos Passos, 17-21.

5 Subject to the rules of each Stock Exchange this is done either directly by and between the two stockbrokers or through a Clearing House acting as the agent of both. On Stock Exchange Clearing Houses, see article on, by Alexander D. Noyes, in Pol. Sc. Quarterly, Vol. VIII. No. 2. p. 252, June, 1893. Among other matters the rules prescribe what shall be "good" delivery of securities as between two contracting stockbrokers.

6 See note 1, above.

The principal rules and customs regulating the manner in which stockbrokers who are members of a Stock Exchange can deal on the floor of the Stock Exchange to which they belong for the purchase and sale of securities have now been described.

Acting in accordance with these rules and customs, stockbrokers can affect various transactions in the purchase or sale of securities for customers who may wish to employ them. The commonest of all these transactions is a simple purchase or sale of securities for a customer who has money which he wishes to invest in securities or owns securities which he wishes to dispose of.[1] The way this transaction is performed is as follows. The first step is for the stockbroker to contract[2] on the floor of the Stock Exchange to buy or to sell the securities the customer wishes bought or sold, either " for cash " or " in the regular way " as the customer may prefer. The stockbroker contracts, as has been stated, in his own name and becomes personally bound to perform the contract or contracts he makes. If he performs with the securities the customer wishes to sell or with the money he wishes to invest it is obvious the customer's desires will be fulfilled. This is the course the transaction regularly takes. For as soon as the stockbroker has contracted the customer supplies[3] him with the means to perform by either giving him the money to pay for the securities he has contracted to buy or the securities to deliver which he has contracted to sell. The stockbroker then performs his part of the contract or contracts he has made and should simultaneously receive from the stockbroker or stockbrokers with whom he has contracted the securities he agreed to buy or the purchase price for the securities he agreed to sell. He then accounts to the customer and gives him the money or the securities he has received. This completes the transaction so far as the purchase or sale of the securities is concerned. The stockbroker, however, must be paid for his services. Even if he were willing to act without compensation, he cannot do so, for the rules of all Stock Exchanges provide that a

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[1] This transaction is consequently known as a purchase or sale " for the investment account." It is proposed to confine this article to a consideration of this transaction only, and not to treat in any way of the other transactions in which a customer may engage.

[2] He makes one contract, or as many contracts with the same or different stockbrokers as may be necessary to carry out what the customer wants.

[3] He may have done so, and often is required to do so, at the very beginning of the transaction. See *post*, page 449.

stockbroker must *at least*[1] charge and be paid a certain fixed sum for every transaction he makes on behalf of any other person, and impose a severe penalty for any violation of this provision.[2] This sum is called the stockbroker's commission, and is a fixed percentage of the par value of the securities contracted to be bought or sold. It is usually provided[3] that the stockbroker must at least charge and be paid this commission without any manner of rebate or return, discount or allowance "on all purchases and sales" and contracts which he makes on the floor of the Stock Exchange. The words "purchases and sales" are here used in their Stock Exchange sense, and consequently the customer must in all cases be prepared to pay this commission when the stockbroker has contracted to buy or to sell. In practice, however, the stockbroker does not usually require him to pay it until he has fully performed the contract or contracts he has made. For services in performing or for unsuccessful efforts[4] in trying to contract the stockbroker makes no charge.

It is now proposed to consider the engagement[5] of a stockbroker by a customer who wishes a simple purchase or sale of securities to be effected. Since this can only be done in the way and on the terms described every engagement of a stockbroker must be adapted to meet the requirements of this way and these terms. And from this point of view the following matters are requisite to all engagements of a stockbroker to make a simple purchase or sale of securities.

1. Since the stockbroker acts as the agent of the customer, he must be vested with authority to buy or to sell the securities the customer wants in the manner described. This way naturally falls into two parts (*a*) the contracting to buy or to sell, and (*b*) the performance of the contract or contracts when made, both of which are done by the stockbroker and both of which must consequently be embraced by his authority.

2. Since the stockbroker performs with the money or securities

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1 The stockbroker has the right to ask for remuneration in excess of his commission, but it is practically unheard of for him to do so.

2 On a stockbroker's commission, see Dos Passos, 231–235.

3 Cf. Constitution and Rules of the New York Stock Exchange, Art. XLIII. p. 67.

4 Dos Passos, 233. This is the general rule respecting brokers of every kind, see Sibbald *v.* The Bethlehem Iron Co., 83 N. Y. 378.

5 The Statute of Frauds has nothing to do with the engagement of a stockbroker *as agent* to buy or to sell securities except in a case of a peculiar engagement not to be performed within a year.

of his customer, a requisite of his engagement is a provision for his being supplied with the money or the securities. This usually takes either the form of a deposit *at the time* the stockbroker is engaged, or, as the making of the contract or contracts is always uncertain, of an offer to supply the money or the securities on the making of the contract or contracts.

3. Since the stockbroker must be paid a commission, on terms and in amount as are fixed by the rules of his Stock Exchange, a requisite of his engagement is a provision for the payment by the customer of this commission according to the requirements of these rules.

Subject to these requisites the stockbroker may be engaged in any way he and the customer may agree upon, and all kinds of promises, provisos, and conditions may be made part of his engagement. There has been established, however, a convenient, brief, and customary way of engaging a stockbroker to carry out a simple purchase and sale of securities. This way is almost always used except where a customer is ignorant of it or peculiar circumstances exist which force the adoption of some other form of engagement. It is proposed to describe what this way is, how the transaction is carried out under its terms, and what rights it gives to the customer and to the stockbroker. It is as follows.

The Order.

The first step is for the customer to give the stockbroker an "order" in the regular form.[1] This form is, "Buy or sell for my account and risk," followed by a statement, which is usually briefly and customarily worded, of the securities which the customer wishes to buy or to sell, and the price at which he wishes them to be bought or sold. To illustrate, a typical order in the regular form would be, "Buy for my account and risk 100 C. B. & Q. at 71."

There are a number of established customs[2] according to which orders in the regular form are interpreted.[3]

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[1] The word "order" will be used throughout this article as signifying only an order in the regular form. The word "order" is commonly used by stockbrokers as signifying any kind of a proposition relating to the purchase or sale of securities. Evidence is admissible to show a written order was changed by a subsequent verbal understanding. Clarke *v.* Meigs, 10 Bosw. (N. Y.) 337; Bickett *v.* Taylor, 55 How. Pr. (N. Y.) 188.

[2] These customs apply to other things besides orders in the regular form, for instance the notices (see *post*, p. 453) given by stockbrokers to their customers; but for the purposes of this article the exact scope of these customs need not be considered.

[3] While the adjudications of courts of law on the question of how far the engage-

With regard to the word with which every such order begins, to wit, " Buy " or " Sell," the following custom is established.

The word " buy " or " sell," as used in an order in the regular form given to a stockbroker who is a member of a Stock Exchange, is taken to mean " contract to buy " or " contract to sell[1] on the Stock Exchange of which you are a member[2] according to its rules and customs."

With regard to the words " for me and at my risk " or " for my account and risk," which follow the word " buy " or " sell " in an order in the regular form, their meaning and the customs which apply to them are as follows.

1. The words " for me " or " for my account " mean that the contract the stockbroker is directed to make is to be made for and on behalf of the customer.

2. The words " at my risk " have the customary significance that the customer assumes the risk of any failure to perform on the part of the stockbroker or stockbrokers with whom his stockbroker contracts, and that he does not require the latter to guarantee in any way that the contract or contracts which he makes will be performed by the stockbroker or stockbrokers with whom he contracts. If these words are omitted in an order, as they may be, they are implied by force of custom.

With regard to the kind of contract the stockbroker is to make, the following custom has been established.

If an order in the regular form does not state a particular delivery for which the securities are (to be contracted) to be bought

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ments of stockbrokers are to be interpreted by the customs of their business are unsatisfactory, it is absolutely clear that an order in the regular form will receive its customary significance. The law is clear that where a *general* authority to buy or to sell personal property is given *without restrictions* to a person engaged in a particular trade, it will be interpreted according to the customs of that trade ; Mechem on Agency, §§ 362, 940, 946, 948 ; for a large collection of cases on the interpretation of the engagements of stockbrokers according to custom and an intelligent discussion of this question, see Dos Passos, Chap. VII. p. 341. See also Harris *v.* Tumbridge, 83 N. Y. 92, aff. 8 Abb. N. C. (N. Y.) 291 ; Horton *v.* Morgan, 19 N. Y. 170; Whitehouse *v.* Moore, 13 Abb. Pr. Rep. (N. Y.) 142; Skiff *v.* Stoddard, 21 Law Rep. Ann. 102, on p. 112 ; cf. also Daylight Burner Co. *v.* Odlin, 51 N. H. 56 ; Putnam *v.* French, 53 Vt. 402.

[1] See *ante*, page 440, note 1.

[2] For two cases illustrating the nature and extent of this custom, see Rosenstock *v.* Tormey, 32 Md. 169; and Porter *v.* Wormser, 94 N. Y. 341 ; see also Dos Passos, 206–212.

or sold, it is taken to mean that they shall be contracted to be bought or sold for "regular" delivery.

With regard to the statement of the amount and kind of the securities to be bought or sold, the following customs have been established.

1. If an order in the regular form simply states a number before the name of a corporation, as, "Sell for my account and risk 100 Union Pacific Ry.," the number in question is taken to mean the number of shares of the capital stock of the corporation named which shall be contracted to be bought or sold.

2. There are in common use among stockbrokers a large number of abbreviations of the full names of corporations and for various kinds of securities. If any of these abbreviations are used in an order in the regular form, they are taken for what they stand for to stockbrokers.

With regard to the statement of the price for which securities are ordered to be bought or sold, the following customs have been established.

1. If an order in the regular form simply states a number at which a number of bonds or shares of stock is to be bought or sold, as, "Sell for my account and risk 100 Erie at 13," the number in question is taken to mean the number of dollars for which each hundred dollars' worth of the par value of the bonds or stock shall be contracted to be bought or sold.[1]

2. If an order in the regular form does not state the price for which securities are (to be contracted) to be bought or sold, the order is taken to mean that the securities shall be contracted to be bought or sold at the "market price."[2]

All the customs according to which what is expressed in an order in the regular form is interpreted have now been stated. But for them an order like, "Buy for my account and risk 100

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[1] The reason for this custom is that stocks and bonds are contracted to be bought and sold on the floor of a Stock Exchange for so much for each hundred dollars' worth of the par value.

[2] Dos Passos, 119, 182. The "market price" is understood to be the best price (*i. e.* highest in case of a sale, lowest in case of a purchase) which the stockbroker can obtain as soon as possible after the order is given. This custom is in accordance with the usual rules of law for interpreting an authority to buy or to sell where no price at which the agent shall buy or sell is fixed. See Mechem on Agency, §§ 946, 362; also Bigelow *v.* Walker, 24 Vt. 149.

C. B. & Q. at 71," would be unintelligible, but when interpreted by them it is perfectly clear and becomes, "I order you to contract to buy for regular delivery for me and at my risk on the Stock Exchange of which you are a member, according to its rules and customs, 100 shares of the stock of the Chicago, Burlington, and Quincy Railroad at 71 dollars for every hundred dollars' worth of the par value of stock."

Since this order is typical of all orders in the regular form, it is possible, now that its exact meaning has been shown, to determine what is the legal significance of all orders in the regular form.

1. *Of what is expressed* in an order in the regular form, the legal effect is that of a proposition to confer upon the stockbroker an authority to contract [1] to buy or to sell according to the rules and customs of the Stock Exchange of which he is a member.

2. Besides this express proposition, there is also to be found in an order in regular form an implied proposition to vest the stockbroker with authority to perform in the way established by the rules of his Exchange the contract or contracts he makes to carry out the order.[2] The ground for [3] this implication is that the customer must be held to propose to authorize the necessary consequences of what he expressly proposes to authorize, and personal performance by the stockbroker of the contract or contracts he makes is a necessary consequence of making it or them, as it is expressly proposed he should do, according to the rules and customs of his Stock Exchange.

3. In addition to these two propositions to confer agencies, an order in the regular form contains an implied offer by the customer that, on condition and in consideration of the stockbroker's making the contract or contracts for which he has express author-

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1 This authority being "to contract," the stockbroker is authorized to carry out the order by making one contract or several contracts with one or different stockbrokers.

2 This authority is general, and the stockbroker can perform with his own money or securities, if he wants to, or in case the customer fails to supply him with the means to perform. Knapp *v.* Simon, 96 N. Y. 284, s. c. 86 N. Y. 311; Cobb *v.* Knapp, 71 N. Y. 384; Markham *v.* Jaudon, 49 Barb. (N. Y.) 462, by Leonard, P. J., on p. 465; Sistare *v.* Best, 16 Hun (N. Y.) 611; Rosenstock *v.* Tormey, 32 Md. 169, s. c. 3 Am. Rep. 126; Giddings *v.* Sears, 103 Mass 311; Mechem on Agency, §§ 977, 365; Daylight Burner Co. *v.* Odlin, 51 N. H. 56; Bennett *v.* Covington, 22 Fed. Rep. 816; Putnam *v.* French, 53 Vt. 402.

3 A further ground lies in a deposit with the stockbroker of the means to perform, which is often made at the time the order is given.

ity, the customer will supply[1] him with the means to perform it or them, and will reimburse and indemnify[2] him for all outlays,[2] expenses,[3] and losses[4] necessarily or unavoidably incurred through the carrying out of the order. This offer remains unaffected[5] by anything the stockbroker may do until he has actually contracted to buy or to sell the securities, when it ripens into a promise and the customer becomes contractually bound. The ground for implying this offer is (*a*) because it is the purpose of the transaction that the customer should furnish the means to perform, and (*b*) because the stockbroker acts only *on behalf* of the customer.

4. An order in the regular form says nothing about the stockbroker's commission. Yet a provision for its payment in accordance with the rules of the Stock Exchange, to which the stockbroker belongs, is a requisite of his engagement. This is, however, secured by the following custom.

An order in the regular form is understood to contain an implied offer by the customer to pay the stockbroker a commission in accordance with the requirements of the rules of the Stock Exchange.[6]

These requirements have been shown to be that the stockbroker shall be paid a fixed commission for every contract he makes. Hence the customer's implied offer is to pay the stockbroker the usual commission on and in consideration of the making of the contract or contracts he makes to carry out the order. This offer

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[1] See authorities cited in note 2 to page 446, and in note 2 below. The offer to supply the means to perform is really a deduction from the offer to indemnify, and where the means are supplied at the time the order is given, it does not exist.

[2] Dos Passos, 129–135; Duncan *v.* Hill, L. R. 8 Ex. 242, revg. L. R. 6 Ex. 255; Mechem on Agency, § 977. This offer protects the stockbroker in case he volunteers or is compelled to perform with his own money or securities. See *ante*, page 446, note 2.

[3] Dos Passos, 159; Marye *v.* Strouse, 5 Fed. Rep. 483; Mechem on Agency, § 977.

[4] The customer must indemnify the stockbroker for any losses incurred through selling spurious securities. Maitland *v.* Marvin, 86 Pa. St. 120; Young *v.* Cole, 3 Bing. N. C. 724; Mechem on Agency, § 977.

[5] The stockbroker's *efforts* to execute his authority to contract are of no concern to the customer, and he is not responsible for any expenses incurred in relation thereto. Mechem on Agency, § 978; cf. Sibbald *v.* The Bethlehem Iron Co., 83 N. Y. 378.

[6] Dos Passos, etc., 231, 232. Cf. "Where there is no express agreement as to the compensation of an agent, usage if any will determine what he should receive." United States *v.* Duval, Gilp. 356; Morgan *v.* Mason, 4 E. D. Smith (N. Y.) 636; Mechem on Agency, § 963. Thus the question of whether the stockbroker has earned his commission is easy of determination, and the difficulties which arise with it in the case of real estate brokers do not exist. Mechem, § 965.

remains as made, and unaffected by anything the stockbroker may do, until he has actually contracted to buy or to sell the securities. Then, by the performance of what the customer offered to pay for, the customer's offer to pay a commission ripens into a promise to do so. In this way a contract springs into existence binding the customer to pay the fixed commission. This contract is of the unilateral or executed variety.

The express and implied terms of an order in the regular form have now been stated.

The "Taking" of an Order.

After an order in the regular form is given to a stockbroker, the next step in the regular way of engaging him is for him to decide whether he will refuse [1] or consent [1] to undertake the express and implied propositions contained in the order to authorize him to contract, according to the rules and customs of his Stock Exchange, and to perform in the regular way the contract or contracts he makes to carry out the order. Since the latter is necessarily involved in the former, he cannot consent to the one without consenting to the other. If he consents to an order he is said to "take" the order. He is under no legal obligation to take every order given to him and can refuse any order he wants to. He is not bound to communicate his consent or refusal to the customer and can leave the one or the other to be inferred [2] from his conduct. Since it is very easy, except in clear cases, for error to arise in the making of this inference, the wiser course is for the stockbroker to communicate his consent or refusal to the customer.[3] This is practically essential in the case of an intended refusal, for from silence after receiving an order consent rather than refusal will usually be inferred. In communicating his refusal or consent he can express the one or the other in any way he likes. Before consenting to an order the stockbroker should make demand for

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1 Where a proposition to confer an authority is made, all that is required to create the relation of principal and agent between the proposer and the person to whom the proposition is made is that the latter should consent to the proposition. His consent need not be necessarily communicated to the proposer, and it may be inferred from his conduct. Mechem on Agency, § 108.

2 See note 1.

3 The practical wisdom of notifying the customer that an order is refused has led some stockbrokers to think they are "bound" to do so, and they act accordingly; but the text states the law correctly, and there does not seem to be any established custom of notifying a customer of the refusal of an order.

any terms he may wish to make part of his engagement. Thus, it is usual for the stockbroker, unless he has entire confidence in the customer's responsibility, to ask the customer to deposit with him the securities the customer wants to sell or the money he wants to invest.[1]

The legal effect of "taking" an order[2] is to constitute the stockbroker the customer's agent, and to vest in him an authority to contract on behalf of the customer to buy or to sell securities in the way and on the terms stated in the order and also an authority to perform in the regular way the contract or contracts if made. As soon as the stockbroker becomes the customer's agent, the law imposes the duty[3] upon him of acting in good faith[4] and with due care[5] in relation to his principal, the customer.

In addition to merely *consenting* to an order, the stockbroker may expressly *promise* in consideration of the customer's giving him the order to act as the customer's agent.[6] It is not usual to find such a promise expressed in words, but it is usual for courts of law to imply it in all cases where an order is "taken." It can,

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[1] If the order is not carried out, the stockbroker must of course at once return to the customer the securities or money deposited with him.

[2] Taking an order has no effect on the implied offers contained in the order; as already stated, they remain mere offers until the stockbroker has actually contracted to buy or to sell the securities.

[3] Harris *v.* Tumbridge, 83 N. Y. 92; Mechem on Agency, §§ 951–954, 454–472. This duty depends on the stockbroker's status as agent, and the remedy for any breach lies in tort.

[4] This duty is very stringently enforced. In doing so judges incline to lay down general rules of conduct rather than to decide each case on its merits. Thus the rule is established and enforced without exception that a stockbroker cannot sell to or buy from himself; Porter *v.* Wormser, 94 N. Y. 431; Levy *v.* Loeb, 89 N. Y. 386; s. c. 85 N. Y. 365; 47 N. Y. Super. Ct. 61; Taussig *v.* Hart, 58 N. Y. 425; Day *v.* Holmes, 103 Mass. 306; — his clerk; Gardner *v.* Ogden, 22 N. Y. 327; — a firm or corporation of which he is a member; Francis *v.* Kerker, 85 Ill. 190; Solomons *v.* Pender, 3 H. & C. 639; — and this without proof of fraud; Porter *v.* Wormser, 94 N. Y. 431; Gardner *v.* Ogden, 22 N. Y. 327; — and even in case where the price obtained or given by the customer is as good or better than would otherwise have been obtained or paid; Taussig *v.* Hart, 58 N. Y. 425; Gardner *v.* Ogden, 22 N. Y. 327; Connor *v.* Black, 24 S. W. (Mo.) Rep. 184. There is no custom among stockbrokers of violating this rule of law; cf. Robinson *v.* Mollett, L. R. 7 H. L. App. Cases, 802. On this whole note, see Dos Passos, 123, 124, 213–226, 280–286; Mechem on Agency, § 936, and cases cited.

[5] The degree of care which a stockbroker must show is to be measured by the standard of care which a faithful and intelligent stockbroker would show. It is not to be measured by the degree of care which is customary, or which stockbrokers usually give, unless such degree of care is what an intelligent and faithful stockbroker would show. Cf. William *v.* Hays, 143 N. Y., 442, on pp. 453, 454; Dos Passos 123–136.

[6] This makes an ordinary unilateral contract of agency.

however, be properly implied only in a case where there is communication[1] between the stockbroker and the customer, on the taking of the order, sufficient to warrant the implication. This is often absent, as where an order is sent by mail and the stockbroker, without notifying the customer of his taking the order, at once proceeds to carry it out, and in such a case no such promise can be implied. The effect of such a promise is to add to the duty of acting in good faith and with due care, which springs from the stockbroker's status as agent, a contractual obligation of the same import.

It is to be noticed that neither the stockbroker's duty as agent nor this contractual obligation bind him so that he will incur any liability if he is unable through no carelessness or fault of his own to carry out the order. Such a liability would be incurred, however, if he should promise to carry out the order, but inasmuch as an order is carried out by the making of one or more contracts, each of which depends on the meeting of the minds of two persons, the stockbroker will not except in very rare cases expressly give such a promise, and a promise to this effect can never be implied from the ordinary facts surrounding and constituting the "taking" of an order in the regular form.[2]

"Taking" the order completes the engagement of the stockbroker in the regular way. All there is to this way can now be seen to be the creation of two agencies, one to contract and the other to perform the contract or contracts made to carry out the order, coupled with an offer to pay a commission on the making of the contract or contracts, and an offer to indemnify the stockbroker, which, where the means to perform the contract or contracts are not deposited at the time the order is given, gives rise to an offer to supply the securities to be sold or the money to be invested when the contract or contracts is or are made.

The "Execution" of the Order.

The scope of every authority is measured by the principal's intent, and only when the agent acts within this scope does he bind the principal. This is the general rule, and is without exception.

For the purposes of this article the intent of a customer in giv-

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1 A contract implied in fact is as dependent on communication of some kind between the offeror and offeree as an express contract.

2 Cf. Fletcher *v.* Marshall, 15 M. & W. 755; Dos Passos, 120.

ing an order in the regular form is assumed to be to vest the stockbroker, if he takes the order, with such an authority as is to be found in the order when interpreted by the customs which have been stated, and consequently with an authority to contract to buy or to sell securities of the kind and in the amount and at the price stated in the order according to the rules and customs of the Stock Exchange of which the stockbroker is a member, and with an authority to perform in the regular way the contract or contracts made to carry out the order.

This authority to perform does not come into existence unless and until the authority to contract is executed. With regard to the execution of the authority to contract, only a few words need be devoted.

The stockbroker must act in good faith[1] and with due care[1] and unless given discretion[2] cannot vary[3] from the terms of the order even where he benefits[4] the customer by so doing. With regard to the manner[5] in which the stockbroker should contract,

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[1] See *ante*, p. 449, notes 3, 4, and 5.

[2] Allen *v.* McConihe, 12 N. Y. Supp. 232. As to what phrase will give him a discretionary power: "Do the best you can for me," see Covell *v.* Loud, 135 Mass. 41, s. c. 46 Am. Rep. 446; "You must take care of yourselves," see Cameron *v.* Durkheim, 55 N. Y. 425; cf. also Billingslea *v.* Smith, 77 Md. 504. Good intentions on the stockbroker's part are no excuse in law for failure to carry out orders. Allen *v.* McConihe, 12 N. Y. Supp. 232.

[3] If any part of the transaction is not carried out according to the customer's intention he is not bound by it. Allen *v.* McConihe, 124 N. Y. 342; Campbell *v.* Wright, 118 N. Y. 594; Scott *v.* Rogers, 31 N. Y. 676; Gruman *v.* Smith, 81 N. Y. 25. He need not in law take any steps to assert this. Allen *v.* McConihe, 124 N. Y. 342; Gregory *v.* Wendell, 40 Mich. 432. But if it does occur he should at once on learning of it give notice to the stockbroker that he repudiates what has been done contrary to his intention. Baker *v.* Drake, 53 N. Y. 211; Hanks *v.* Drake, 49 Barb. (N. Y.) 186. The reason for the customer's repudiating anything done contrary to his intention is as follows. The customer has the right to ratify anything done contrary to his intention. Gillette *v.* Whiting, 120 N. Y. 402; Harris *v.* Tumbridge, 83 N. Y. 92; Taussig *v.* Hart, 49 N. Y. 301; Brass *v.* Worth, 40 Barb. (N. Y.) 648; Dos Passos, 212. And his ratification makes the matter ratified as if it had been originally authorized. Mechem on Agency, §§ 110, 167. Silence on the customer's part after notice of an act done contrary to his intention is evidence of ratification, and hence, to prevent a "ratification by silence," he should repudiate any act done contrary to his intention as soon as brought to his notice.

[4] Unless the customer ratifies and accepts it. Thus the stockbroker has no right to buy or to sell, where the price is fixed, at a better price. Nesbitt *v.* Helser, 49 Mo. 383; Smith *v.* Bouvier, 70 Pa. St. 325; Borham *v.* Godfrey, 1 Knapp, 381; Dos Passos, 167.

[5] In spite of the maxim *Delegata potestas non potest delegari*, custom permits a stockbroker to delegate the execution of an order to some other stockbroker. Dos Passos, etc., 104, 230, 231; Green *v.* Johnson, 90 Pa. St. 38; Gregory *v.* Wendell, 40 Mich. 432;

it need not be described here, for it would be merely restating what has already been stated at the beginning of this article in the description there given of the way stockbrokers deal together according to the rules and customs of the Stock Exchange to which they belong. As already indicated, the stockbroker can make one contract, or as many contracts with the same or different stockbrokers as he deems advisable,[1] provided that the total amount[2] of securities bought or sold shall be the amount stated in the order. In so contracting the stockbroker can either make an offer or offers to be accepted, or accept an offer or offers made by another stockbroker or other stockbrokers, provided that the offer or offers if accepted will result in contracting to buy or to sell securities according to the terms of the customer's order. With regard to the matters of price, amount,[2] and kind of securities, the stockbroker must carry out the order exactly.[3] If in any case a stockbroker succeeds[4] in *contracting to buy or to sell as he is ordered* to, he is said to have "executed" the order, and the order is said to be or to have been "executed."[5]

What the stockbroker has to do to execute the order has been stated, and the next question is, When must he do it? Since the stockbroker at the time he takes the order does not usually promise

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Rosenstock *v.* Tormey, 32 Md. 169. So the stockbroker can delegate to his clerk the doing of the acts constituting performance of the contract or contracts made. Mechem on Agency, § 944. Where, however, anything is left to the stockbroker's discretion, he must exercise his personal judgment. Simms *v.* May, 16 N. Y. St. Rep. 780.

[1] His authority being "to contract."

[2] No custom exists allowing a stockbroker to contract to buy or to sell a less amount of securities than he is ordered to in a case where no discretion is given to him to do so. This discretion is, however, usually given with all orders to buy or to sell more than 100 shares or 10 bonds, and the number of shares or bonds stated in the order is in such case treated as a limit. Dos Passos, 119, 120; Marye *v.* Strouse, 5 Fed. Rep. 483; where the discretion is given, the order is said to be "executed" for as many shares or bonds as are contracted to be bought or sold.

[3] An order to purchase at $57\frac{1}{8}$ is not fulfilled by a purchase at $57\frac{7}{8}$ or 58. Genin *v.* Isaacson, 6 N. Y. Leg. Obs. 213. Cf. Day *v.* Holmes, 103 Mass. 306, and Pickering *v.* Demerritt, 100 Mass. 416. The same thing would be true of an order to sell. An order to buy "regular" is not fulfilled by a purchase at thirty days seller's option. Taussig *v.* Hart, 58 N. Y. 425. An order to sell wheat on a *particular* day is not fulfilled by a sale on the following day. Scott *v.* Rogers, 31 N. Y. 676.

[4] Until the stockbroker has done something to bind the customer, viz. "execute" the order, an order can be revoked. Dos Passos, etc., 120, 121, 165. On the general principles governing the revocation of orders given to brokers, see Sibbald *v.* The Bethlehem Iron Co., 83 N. Y. 378; Mechem on Agency, §§ 204, 968.

[5] Consequently the performance of the contract or contracts is not included, technically speaking, in the "execution" of an order.

that he will carry out the order, it might be thought that the customer was exposed to the danger of the stockbroker taking an order and making no effort to carry it out. This danger does not, however, exist. It is overcome by the following customs.

1. An order to buy or to sell securities can only be executed, if at all, on the day it is given, unless it is expressly stated in the order that it is "good" for a longer period[1] of time or for some particular period of time.[2]

2. Unless precluded by the terms of an order to buy or to sell securities, there is implied as a term or condition of the agency conferred by the order that the stockbroker shall try to execute the order as early in the time for which it is "good" as it is possible for him to do in accordance with the rules and customs of the Stock Exchange to which he belongs.

These customs will be enforced[3] by courts of law, and if the stockbroker does not comply with them it will be considered a breach of his duty to act with due care.

The Notice.

As soon as he can after executing an order the stockbroker should communicate the fact that he has done so to the customer. This duty is established by custom and will be enforced[4] by courts of law. The stockbroker need not follow any particular form in making this communication. It is usual, however, to make it in the form of a written notice.[5] This notice states in a brief form exactly what kind of contract or contracts the stockbroker has made, and gives in addition the name of the stockbroker or stockbrokers with whom the contract or contracts has or have been made. As regards the wording of such a notice, the same customs which affect the interpretation of the terms of an order apply in

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[1] This custom is opposed to the rule that an authority is good till countermanded, if such a rule exists. Cf. Dickenson *v.* Tilwall, 1 Stark. 128, s. c. 4 Campb. 279. Mr. Dos Passos seems to be ignorant of this custom. Dos Passos, 120.

[2] In such a case it is usually made "good till countermanded," which is usually abbreviated, when written, to G. T. C.

[3] See *ante*, page 443, note 3.

[4] Finney *v.* Gallaudet, 15 Daly (N. Y.), 66; Hoffman *v.* Livingstone, 46 N. Y. Super. Ct. 552; Cameron *v.* Durkheim, 55 N. Y. 425; Dos Passos, 190. The stockbroker is permitted to give evidence that a notice contained errors. Porter *v.* Wormser, 96 N. Y. 431.

[5] See *ante*, p. 443, note 3.

the same way, *mutatis mutandis*, as they do to an order. Since these customs have been stated, they need not be repeated here. A notice which would be typical would read, "I have bought for your account and risk 100 C. B. & Q. at 71 from Brown." The notice must be given to the customer in such a way as that knowledge of its contents can be imputed fairly to him. To do this it would be held in most jurisdictions that mailing to the customer the notice properly addressed and postage prepaid, or leaving it at his business office or home, was sufficient, without proof that the notice reached him, where there was no evidence that it did *not* reach him.[1]

The legal nature of the obligation imposed by the custom requiring the stockbroker to give this notice to the customer is difficult to determine. It may be considered that the giving of the notice is a condition of the customer's offer to pay a commission,[2] or that it is independent of the customer's offer, and is a part of the stockbroker's duty as agent which does not come into existence until the order has been executed and the commission earned. The latter view seems to be the correct one, and to have been adopted in the case of Hoffman *v.* Livingstone,[3] the only case on this question. That it is the only case shows of what little importance this question is. The practical necessities of notifying the customer are so great that the stockbroker will not neglect it.

If the former view is taken, the customer's offer to pay a commission does not ripen into a promise until he has been notified; if the latter, it ripens into a promise as soon as the order is executed. At the one time or the other the customer is bound to

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[1] In Granite Bank *v.* Ayers, 33 Mass. 392, Shaw, C. J., lays down the rule that "all notices at one's domicile, and all notices respecting transactions of a commercial nature at one's known place of business, are deemed in law to be a good constructive notice, and to have the legal effect of actual notice." Subject to this rule of law, the question whether the customer was notified or not is a question for the jury. Minor *v.* Beveridge, 141 N. Y. 399.

[2] Cf. such cases as Ramsgate Victoria Hotel Co. Lim. *v.* Montefiore, L. R. 1 Ex. 109, and In re National Savings Bank Association; Hebb's Case, L. R. 4 Eq. 9. If this view is taken of the duty to give notice, it would seem that logically the customer could revoke his order until the notice was given him; but whatever consequences are to be given to such a revocation, the customer cannot relieve himself from being bound by the execution of the order, if the stockbroker has done so before the revocation takes place, inasmuch as, in executing the order, the stockbroker acts as agent for the customer, and binds him by his acts.

[3] 46 N. Y. Superior Court, where it was decided that a failure to give this notice was such "negligence" on the part of the stockbroker as to preclude him from recovering his commissions.

pay the commission, but it matters little which time, for there is no obligation upon him to actually pay it until the stockbroker asks for it. In the case of a purchase of securities the stockbroker may demand his commission at any time that is convenient to him, but in the case of a sale of securities the custom is for him to wait until he has received the purchase price from the buyer, and then to deduct his commission from it before turning it over to his customer.

The Performance of the Contract.

If the stockbroker has not previously demanded and received from the customer the means to perform the contract or contracts he has made, he will demand them at the time he notifies the customer of the " execution " of the order, or as soon thereafter as he needs them. The customer is bound[1] to comply with this demand by reason of his offer, already described, to do so, in consideration of the execution of the order.

As already stated, the stockbroker has authority to perform in the regular way the contract or contracts he has made, which authority is dormant till the contract or contracts is or are made, and comes to nothing if the stockbroker fails to " execute " the order.

In carrying out this authority the stockbroker[2] must act in good faith and with due care towards his customer. As already stated, this duty is created by " taking " the order, and where at that time there is no communication from the stockbroker to the customer it can only rest on his status as agent, and no contractual obligation to act as the customer's agent can be implied. But a contractual obligation can be implied, and will usually be implied from the deposit of the means to perform by the customer after the " execution " of the order at the stockbroker's implied or express request.

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[1] If the customer fails to supply the means to perform, the stockbroker can perform with his own means. See *ante*, p. 446, note 2. In such a case, the stockbroker can, if he has bought securities, resell them without notice or tender, and charge the customer with the loss, if any. Knapp *v.* Simon, 96 N. Y. 284, s. c. 86 N. Y. 311; Whitehouse *v.* Moore, 13 Abb. Pr. (N. Y.) 142; Markham *v.* Jaudon, 49 Barb. (N. Y.) 462, on p. 465; or he can hold the stock for the customer's account, and sue for what he had to pay, *i. e.*, the original purchase price. Giddings *v.* Sears, 103 Mass. 311; Knapp *v.* Simon, 96 N. Y. 284, s. c. 86 N. Y. 311; Bennett *v.* Covington, 22 Fed. Rep. 816.

[2] This duty is not affected by the fact that for acting as agent in performing, the stockbroker receives no pay. Isham *v.* Post, 141 N. Y. 100.

This really constitutes a second agency to perform in the regular way. It is not usual to find an express promise that the stockbroker will act as the customer's agent in performing. Nor is it usual to find at any point in the engagement of the stockbroker any express obligation binding him to perform the contract. It might be thought requisite that such an obligation should be created. If it were required it would be for the customer's protection, and it is not necessary for that. First, because of the stockbroker's duty to act in good faith and with due care, which arises, as has been stated, from his agency to perform; and secondly, because the stockbroker, in order to relieve himself from the personal liability he assumes in contracting as he does in his own name, is always ready, without being under any obligation to the customer to do so, to perform any contract he may make on behalf of a customer if the customer supplies him with the means to do so.

It does not seem necessary to describe the actual steps the stockbroker takes to perform in the regular way a contract or contracts he has made on behalf of a customer. On performing he must of course receive the securities which he contracted to buy where the customer ordered securities bought, and the price in money he contracted to sell for where the customer ordered securities sold.[1] Since he actually receives these as the agent of his customer, it is part of his duties to account[2] for them promptly to the customer. This completes the transaction.

Eliot Norton.

NEW YORK.

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[1] It is said that, as "brokers" do not have their principals' property intrusted to them, they have no lien. Mechem on Agency, § 979. But as *stock*brokers do have their principals' property delivered to them, it would seem that they, like factors, to whom in many respects they may be compared, have a lien for their commissions, etc.

[2] On the duty to account, see Mechem on Agency, §§ 955, 522. It is part of the stockbroker's duty, where he buys shares, to have them transferred into the customer's name. On what will excuse him from so doing, see Horton *v.* Morgan, 19 N. Y. 170.